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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CURTIS W. HARRIS, *ET AL.*,

Appellants,

v.

DONALD MOON, *ET AL.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the district court err in subjecting Virginia's creation of a single majority-black congressional district to strict scrutiny?

2. Did the district court misunderstand this Court's test for determining if race is the predominant motivation behind a reapportionment plan, when it ignored evidence that the configuration of the Third Congressional District was the product of Virginia's *actual* "traditional districting principles," namely (a) partisan considerations; (b) incumbency protection; and (c) the Commonwealth's unique and long-standing policy of splitting the Tidewater area among several congressional districts?

3. Assuming that strict scrutiny was required, did the district court misinterpret this Court's analysis in *Bush v. Vera*, 116 S.Ct. 1941 (1996), and *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), when it found that the Third Congressional District was not narrowly tailored?

4. Did the district court misunderstand the third prong of the test announced by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), when it found no legally significant racial bloc voting within the Third Congressional District by relying on evidence of black electoral success (a) in majority-black districts or (b) based on votes cast by white voters in other parts of the Commonwealth?

5. Did the district court ignore the Commonwealth's contemporaneous strong basis in evidence for concluding that the Voting Rights Act would require creation of a majority-black congressional district?

PARTIES

The following were actual parties in the court below:

Donald Moon
Robert Smith

Plaintiffs;

M. Bruce Meadows, in his official capacity as Secretary of the State Board of Elections

Defendant;

Curtis W. Harris
Jayne W. Barnard
Jean Patterson Boone
Raymond H. Boone
Willie J. Dell
Henry C. Garrard, Sr.
Walter J. Kenney, Sr.
Melvin R. Simpson
Gerald T. Zerkin

Defendant-Intervenors.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The February 7, 1997, opinion of the three-judge district court is contained in the Appendix to the Jurisdictional Statement filed in No. 96-1779, *Meadows v. Moon*[1] [hereafter "*Moon* J.S. App."], at pages 3-33; it is reported at 952 F. Supp. 1141 (E.D. Va. 1997), and is also available on LEXIS at 1997 U.S. Dist. LEXIS 1560. The district court's order dated February 7, 1997, granting declaratory and injunctive relief is contained in the *Moon* J.S. App. at pages 1-2.

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[1] M. Bruce Meadows is the Secretary of the Virginia State Board of Elections. He was sued in his official capacity. The appellants in this appeal are a group of private citizens who live within the challenged Third Congressional District. They participated as defendant-intervenors in the litigation below.

JURISDICTION

The district court entered judgment on February 7, 1997. *See Moon* J.S. App. at 1-2. Appellants filed their Notice of Appeal to this Court on March 7, 1997. That notice is contained in the Appendix to this Jurisdictional Statement at pages A-1 to A-2 [hereafter *Harris* J.S. App."]. On May 1, 1997, Chief Justice Rehnquist granted appellants' request for an extension of time to and including May 30, 1997, to file their Jurisdictional Statement. No. A-767. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment, which is reprinted in *Moon* J.S. App. at 38; sections 2 and 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §§ 1973 and 1973c, which are reprinted in *Moon* J.S. App. at 40, 53-55; and two Virginia statutes -- 1991 Va. Acts of Assembly, Special Session II, Ch. 6, and 1993 Va. Acts of Assembly, Ch. 983, which are reprinted in *Moon* J.S. App. at 60-78.

STATEMENT OF THE CASE

This case involves a constitutional challenge to Virginia's 1991 congressional apportionment.[2] The plaintiffs

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[2] The plan enacted in 1991 was the subject of "technical" amendments in 1992 and 1993 intended to "reduce the number of split precincts for localities and to conform the lines to new local precincts and new local and state legislative election district lines." Joint Exhibits at 1691 [hereafter "Jt. Exh."]. Most of these changes were "initiated by local requests," connected with the ease of electoral

(appellees in this Court) are two voters who live within the Third Congressional District. They challenged the plan as an unconstitutional racial gerrymander.

According to the 1990 census, Virginia's total population was 6,187,358, of whom 1,162,994 (18.8%) were black. Most of the Commonwealth's black residents (59.17%) lived in majority-black census blocks; nearly one quarter (24.29%) lived in census blocks that were more than 90% black. By contrast, more than one third of Virginia's non-black residents (34.31%) lived in a census block that did not contain a single African American. *See* Declaration of William S. Cooper ¶¶ 8,9 (Attachment 22 to Defendant-Intervenors' Brief in Opposition to Motion for Summary Judgment).

The 1990 census resulted in Virginia receiving one additional House seat, bringing the size of its congressional delegation to eleven. Thus, Virginia had the duty not simply to readjust boundary lines between districts to respond to population shifts, but actually to create at least one completely new congressional district, thereby necessarily altering many of the Commonwealth's other districts as well.

The 1991 apportionment took place under four conditions that had not obtained in prior reapportionment cycles. First, this Court's intervening decision in *Karcher v. Daggett*, 462 U.S. 725 (1983), required near-absolute population equality among districts. This requirement would inevitably force the Commonwealth to relax any policy of trying to avoid splitting political subdivisions.[3] Second, Congress'

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administration, *see id.* at 1715.

[3] Indeed, the population deviations in Virginia's 1981 apportionment plan -- which had fewer subdivision splits than its 1991 plan -- were far larger than the deviations in the New Jersey congressional

intervening amendment of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), meant that even an apportionment plan that was not purposefully discriminatory or retrogressive might nonetheless violate federal law if it resulted in a dilution of the voting strength of a geographically compact, politically cohesive group of black voters. As a matter both of the Supremacy Clause and of positive state law, Virginia had an obligation to avoid violating amended section 2. *See Jamerson v. Womack*, 244 Va. 506, 511 (1992). Third, Virginia's 1991 redistricting would be the first in a generation where one political party (the Democrats) controlled both the General Assembly and the governorship, thus offering an opportunity for largely unconstrained political gerrymandering. Fourth, computer technology and more finely honed census data allowed for far finer line drawing -- with attendant boundary irregularities -- than had been possible in 1980 or before. *See* Trial Tr. at 326-28 [hereafter "Tr."].

Before beginning the reapportionment process, the Senate Committee on Privileges and Elections adopted a resolution ("Resolution No. 1"), setting out five "criteria" and four "policy considerations" that redistricting plans ought to achieve. Jt. Exh. 1. The five criteria were mandatory, while the four policy "considerations" were simply that -- factors the assembly should weigh in the redistricting process to the extent they did not interfere with the criteria. *See Jamerson*, 244 Va. at 514 (explaining, as a matter of state law, the difference between constitutionally compelled criteria and policy considerations).

The first criterion was "[e]qual [r]epresentation," by

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apportionment that triggered *Karcher*'s requirement of heightened scrutiny.

which the senate meant equal population for each district. Jt. Exh. 1. The second criterion was "[m]inority [r]epresentation, which the senate defined to mean that "[d]istrict plans shall not dilute minority voting strength *and* shall comply with §§ 2 and 5 of the Voting Rights Act." *Id.* (emphasis added). The third criterion was compactness, which was defined in the following terms:

> Districts shall be reasonably compact. Irregular district shapes may be justified because the district line follows a political subdivision boundary or significant geographic feature.

Id. at 2. The fourth criterion was contiguity, and here the senate provided that

> Contiguity by water is acceptable to link territory within a district in order to meet the other criteria stated herein and provided that there is reasonable opportunity for travel within the district.

Id. The final criterion was "[p]olitical [f]airness"; it provided that a districting plan was unacceptable if it had "the purpose and effect of denying any group of persons who share a common political association a fair opportunity to participate in the political process." *Id.*

The four "policy considerations" were, first, that plans should be drawn so as to avoid splitting political subdivisions "to the extent practicable"; second, that consideration be given "to preserving communities of interest"; third, that precincts serve as the basic building block for districts when it might be necessary to split political subdivisions; and fourth that "existing districts and incumbency" might be taken into account. *Id.*

At least during this century, Virginia had never had a majority-black congressional district, and no black candidate had been elected to Congress. In 1986, Bobby Scott -- a popular black state senator who represented a predominantly white state senate district -- had run for Congress as the Democratic nominee from the First Congressional District, but had lost, receiving less than 8 percent of the white votes cast. *See Moon* J.S. App. at 84. In light of the Commonwealth's substantial (and geographically concentrated) black population, the continuing prevalence of racial bloc voting, pressure from a politically active black community, and the Voting Rights Act's requirements, there was widespread agreement among all the participants in the redistricting process that the Commonwealth should draw a majority-black district if it could be done without sacrificing other important state interests.

There was a strong contemporaneous basis in evidence for this consensus. Members of the General Assembly were aware of the facts surrounding the Bobby Scott congressional campaign, as well as of the fact that Scott was the sole black state legislator -- in either house -- to have been elected from a majority-white jurisdiction at any time in the 1980's. They were aware as well of a series of judicial findings of racial bloc voting in the Richmond, Petersburg, Tidewater, and Southside regions stretching back to *City of Petersburg v. United States*, 354 F. Supp. 1021, 1025-26 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), and *City of Richmond v. United States*, 422 U.S. 358 (1975), and extending to the present day, *see, e.g., Collins v. City of Norfolk,* 883 F.2d 1232 (4th Cir. 1989), *cert. denied,* 498 U.S. 938 (1990); *McDaniels v. Mehfoud*, 702 F. Supp. 588 (E.D. Va. 1988) (Henrico County). In addition, since the 1981 round of redistricting, many communities within those regions had settled section 2 vote dilution lawsuits and had agreed to draw majority-black districts. *See, e.g., United States v. City of Newport News*,

Civ. No. 4-94CV155 (E.D. Va. Nov. 4, 1994) (consent decree); *Harris v. City of Hopewell*, No. 82-0036-R (E.D. Va. Jan. 5, 1983). These settlements had been approved by local federal courts and precleared by the Department of Justice. Moreover, members were aware of the presence of many of the other "Senate Report" factors on which courts rely in assessing section 2 claims -- such as Virginia's long history of official racial discrimination touching on the right to vote, *see, e.g.*, *Harman v. Forssenius*, 380 U.S. 528 (1965); vast socioeconomic disparities between blacks and whites; and the virtual inability of black candidates to get elected in majority-white jurisdictions. In fact, Bobby Scott and Governor L. Douglas Wilder were the *only* examples in the twentieth century of black candidates successfully winning major office from majority-white constituencies.

As experienced politicians, members of the General Assembly were aware of the special circumstances and advantages both men had enjoyed, including multiple white candidates in their early elections, Tr. at 302; incumbency (in Scott's later race), *see id.* at 304; the presence of a coattail effect from a popular running mate and predecessor (in Wilder's races for Lieutenant Governor and Governor, respectively), Jt. Exh. 2065-69; unusually high black turnout, Pl. Exh. 22; Def. Exh. 1; Tr. 436-40; and the salience of abortion as a wedge issue in Wilder's gubernatorial race. And political data before them showed that Wilder's white support was substantially weaker in the very areas where a black district would be created. He got a lower percentage of the vote in white precincts in the area where the Third District was located than he got statewide. *See* Tr. at 434; Def. Exh. 1. Even though Virginia did not face direct pressure from the Department of Justice, *see Moon* J.S. App. at 20-21, the General Assembly knew, *at the time it drew the 1991 plan*, that there was a substantial likelihood of a successful section 2 lawsuit if it failed to draw a single

majority-black district in a state that was nearly 20% black. Mary Spain, counsel to the Privileges and Elections Committee, had specifically advised its members of the relevant requirements under the Voting Rights Act, including the issue of whether a majority-black district was required. *See, e.g.*, Jt. Exh. 14-A, at 9-10; Tr. at 237-38.

Every plan considered on the floor of the General Assembly -- whether proposed by Democrats, Republicans,[4] or nonpartisan groups -- contained at least one majority-black district. *Moon* J.S. App. at 6. All of the plans located their majority-black district in roughly the same areas. The most plausible plans extended from Richmond in the center of the Commonwealth towards the Tidewater area -- a distance of approximately 100 miles and well within the traditional size and extent of Virginia's congressional and legislative districts. *See* Tr. at 339; *Jamerson*, 244 Va. at 509 (approving, as compact within the meaning of Virginia's constitutional requirements, state senatorial districts that stretched 145 and 165 miles from west to east).

Some of the proposed majority-black districts were more compact than the district ultimately chosen. *See, e.g. Moon* J.S. App. at 80; Tr. at 347-48. But these districts had unacceptable side effects. Some of the side effects are familiar to this Court from other cases -- for example, plans placed more than one incumbent in the same district or caused politically undesirable ripple effects in adjoining districts, *see, e.g.*, Tr. at 349, 351. These sorts of effects are fairly typical of any plan that seeks to create a new district, rather than simply to adjust the boundaries of pre-

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[4] Evidence at trial suggests that one Republican-sponsored plan created a majority-black district largely as cover for an attempt to strip white Democratic incumbents of their constituencies. See Tr. at 224-27.

existing districts.

But there was one side effect that needs to be highlighted, for it makes Virginia unique among the states whose reapportionment plans have come before this Court. Much of Virginia's economy depends on defense spending. In particular, military installations and contractors are the economic lifeblood of the Hampton Roads area. The installations are located relatively close together. Someone unfamiliar with the realities of congressional politics might propose the creation of a geographically compact district containing these various facilities. But Virginia has a longstanding policy of taking precisely the opposite approach, and dividing the Tidewater region among more than one district. Virginia concluded, from long experience, that it benefits the Commonwealth to locate military facilities in a number of districts, thereby increasing the number of representatives with bases in their districts who serve on relevant House committees. For example, during public hearings on the various proposed plans, Delegate Melvin raised the concern that Norfolk Naval Shipyard and Newport News Shipbuilding "not be in the same district," Jt. Exh. 14-D at 27, and Delegate Cooper explained that it was "crucial" to "mak[e] sure we have enough congressional voice" by making sure "some shipyards are in the third" while other facilities were in other districts, *Id.* at 39-40. *See also* Tr. at 241-42; 251-52; 343-44; 346. Moreover, it was especially important, given Congress' direct control over military spending, to preserve the seniority of various representatives who served on Armed Forces Subcommittees, such as First District Rep. Herb Bateman (R-Newport News); Second District Rep. Owen Pickett (D-Virginia Beach); and Fourth District Rep. Norman Sisisky (D-Petersburg).

Thus, in the very area of the state where there was a heavy concentration of black voters that would necessarily be

one building block of any majority-black district, Virginia had traditional districting principles that militated *against* a mechanical quest for compactness. Put simply, fetishistic adherence to abstract topological compactness would *subordinate* the Commonwealth's "traditional districting principles." Since Virginia conducted its reapportionment before this Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993) [*Shaw I*], and the existing case law suggested that compactness was in no sense a federal constitutional requirement, *see, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the General Assembly had no reason to hesitate in trading off some measure of geographic compactness in order to more fully realize a constellation of other goals.

The tradeoff was a logical necessity since "[m]ore constraints [in the districting process] imply fewer possible solutions," Peter Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1335 (1987). The General Assembly split the city of Newport News, for example, because the city was home to both a powerful incumbent (Bateman) and the most likely candidate for the new seat (now-Rep. Bobby Scott). *See* Tr. at 264. Other irregularities were the product of desires to preserve Representative Sisisky's base in Petersburg and Representative Bliley's base in Richmond. *See* Tr. at 349, 359.

But the legislature did not sacrifice regularity of boundaries more to create the Third District than it did for entirely non-racial reasons in other regions of the Commonwealth. In Northern Virginia, for example, the Democratic-controlled assembly created a second new district. (It managed to create a second open district by taking then-Representative George Allen, a Republican who represented a district in the center of the Commonwealth, out of his district and relocating him into the district of a more senior Republican incum-

bent. *See* Tr. at 359.) The new district, which was purposefully drawn to give the Democrats an opportunity to pick up a seat, was extremely irregular, having a "shape that vaguely recalls the human digestive tract." Congressional Quarterly's Politics in American 1994, at 1602 (P. Duncan ed. 1994).[5] With respect to dispersion scores -- one standard measure of compactness -- both the First and the Ninth Districts were more irregular than the Third District. *See* Tr. at 133.

Similarly, the newly drawn Third Congressional District was more compact than at least one district that had been used in the 1981 reapportionment plan, despite the fact that the 1981 plan as a whole was more compact than the 1991 plan.[6] *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluation Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 573 (1993). And in even earlier apportionments, congressional districts had stretched from Richmond to Williamsburg and from a Richmond suburb to Hampton, Virginia Beach, and the Eastern Shore. *See* Tr. at 339, 376-77.

Nor did the 1991 plan either unnecessarily "pack" black voters into the Third District or "maximize" black representation. The plan left several pockets of black voters in adjacent white districts, rather than extending the Third District's boundaries to encompass them. Tr. at 361. And

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[5] The shape of the Eleventh District is in no sense a product of the shape of the Third District. The two districts are separated from each other by parts of several other districts.

[6] For example, in the post-1980 plan, the majority-white First District was contiguous only across water; to get from one part of the district to another on land required going through the Second District. Tr. at 129.

it contained fewer black voters than many of the alternative plans, including some plans that were arguably more compact. *See* Jt. Exh. 7, Attachment 15, at 14-15. Moreover, although there were alternative plans that proposed two majority-black districts, giving blacks rough proportionality (18.18% of the districts with 18.8% of the population), or proposed a heavily black "influence" district in addition to a majority-black seat, *see id.*, the legislature squarely rejected these suggestions in favor of a plan that better accommodated the constellation of state interests involved in reapportionment.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case raises important questions regarding how courts should evaluate claims of overly race-conscious redistricting under the equal protection clause. This Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993) [*Shaw I*], *Miller v. Johnson*, 115 S.Ct. 2475 (1995), *Shaw v. Hunt*, 116 S.Ct. 1894 (1996) [*Shaw II*], and *Bush v. Vera*, 116 S.Ct. 1941 (1996), set out a two-stage process for analyzing such claims. In the first stage, a plaintiff bears the burden of showing that "race was the predominant factor" behind the challenged plan. *Miller*, 115 S.Ct. at 2488. To show that race was "predominant" requires showing that the legislature "subordinated traditional race-neutral districting principles ... to racial considerations." *Id.* In sum, the first stage is comparative. It requires a court to ask whether race was more important than other factors in the districting process.

In the second stage, which a court reaches only if the plaintiff has met this burden, the question is whether the plan "can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest." *Id.* at 2482. Among the interests this Court has found compelling is compliance with section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *See*

Vera, 116 S.Ct. at 1969 (O'Connor, J., concurring); *id.* at 1975 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting); *id.* at 2007 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting). A state meets its burden of justifying the challenged district if it shows (1) that it had a "strong basis in evidence" to believe that creation of a majority-black district was necessary to comply with section 2, *see, e.g., Vera*, 116 S.Ct. at 1960 (opinion of O'Connor, J.); *Shaw I*, 509 U.S. at 656, and (2) that the district it drew both is "reasonably" compact, *see Vera*, 116 S.Ct. at 1961 (opinion of O'Connor, J.), and "substantially addresses the § 2 violation," *Shaw II*, 116 S.Ct. at 1907.

The district court botched both stages of this inquiry. The district court never should have applied strict scrutiny in the first place because Virginia did not subordinate its traditional redistricting principles to race. In contrast to other states whose plans have come before this Court, Virginia has a well-established, hierarchically organized set of redistricting principles. These principles take into account Virginia's distinctive interests and reflect a particularized conception of "compactness" and "contiguity" that respects the Commonwealth's geography. But the district court discarded Virginia's actual principles in favor of inventing its own notions of what compactness requires. Having misunderstood both the historical practices and contemporary realities, the district court got things exactly backward: it failed to see that the Third District was the product of a process in which incumbency, partisanship, and the desire to preserve a large and influential Tidewater delegation all played a more significant role than race.

Moreover, even if the district court had been correct in its decision to apply strict scrutiny, its consideration of whether the Third District was narrowly tailored to achieve a compelling state interest was infected by a series of legal

and factual errors. With regard to the question whether the state had reason to fear a a meritorious section 2 lawsuit, the court completely misapplied the third *Gingles* factor, which asks whether there is outcome-determinative white bloc voting. Because the district court mangled the third prong of *Gingles*, it failed to comprehend Virginia's strong basis in evidence for drawing a majority-black district.

As for narrow tailoring, here too the district court's opinion misapplied the relevant legal standard to a misunderstood set of facts. In *Shaw II*, this Court explained that narrow tailoring means that the "remedial district" should be located in the region of a state where the potential section 2 violation can be shown. *See* 116 S.Ct. at 1906-07. The Third District is located in precisely such a place. It connects jurisdictions with persistent, well-known, and often judicially recognized racial bloc voting. The district court's finding to the contrary rested entirely on its conclusion that not every jurisdictions that had been sued was within the Third District and that some jurisdictions were only partially within the district. This conclusion fails to appreciate, first, that the Third District is located entirely within areas where repeated voting rights problems occurred, and second, that the parts of the jurisdictions that were put within the Third District were precisely the parts where the victims of the section 2 violations lived.

Finally, even if the district court had reached the right result for the wrong reasons, its decision still warrants full consideration by this Court. The district court's numerous legal and factual errors threaten to infect the remedial process, and this Court should correct them in order to make sure both that the district court does not improperly intrude on the Commonwealth's districting prerogatives and that the vital interests of Virginia's black citizens are properly taken into account.

I. Race was not the predominant factor in the creation and configuration of the Third District

The district court's conclusion that race predominated in the creation of the Third District rests on three premises. First, the court believed that the Commonwealth "admit[ted] as much" in the course of obtaining section 5 preclearance. *Moon* J.S. App. at 11. Second, the court saw direct evidence of legislative intent in documents prepared in the course of responding to changes proposed by the Governor and making technical amendments to the 1991 plan. *See Moon* J.S. App. at 12-13. Finally, the district court inferred from the shape of the Third District that race had predominated over traditional districting principles of compactness, keeping political subdivisions intact, and respecting communities of interest. *See Moon* J.S. App. at 14-18. None of these premises stands up to careful examination.

A. The Commonwealth's section 5 submission provides no evidence of racial predominance

With regard to the district court's reliance on statements made by the Commonwealth during the preclearance process, as this Court has made clear, the sole question to be answered in a section 5 preclearance proceeding is whether the proposed change will have a racially discriminatory purpose or effect. See *Reno v. Bossier Parish School Bd.*, 65 U.S.L.W. 4308 (May 12, 1997); *Beer v. United States*, 425 U.S. 130, 141 (1976). Thus, the central focus of a section 5 inquiry is on the racial fairness of the plan, and not on whether or how it responds to non-racial concerns. To obtain preclearance, a state simply must focus on how its plan fully respects black voting strength. Discussions of the extent to which a plan serves a state's interests in incumbent protection, delegation seniority, boundary regularity, or any other non-racial factor are relevant only to the extent that

they might explain why a state declined to draw a particular majority-black district. *Cf. Shaw II*, 116 S.Ct. at 1904 (relying on the North Carolina General Assembly's explanations for why it had not drawn a second majority black district as persuasive evidence of a lack of discriminatory purpose). Contrary to the district court's view, it is not the slightest bit "[s]trikin[g]," *Moon* J.S. App. at 11, that the Commonwealth did not discuss its consideration of non-racial factors in its redistricting process. Given the primacy of legislative authority over redistricting, those factors were frankly none of the Justice Department's business, as long as they did not prevent the Commonwealth from treating blacks fairly. Since Virginia's plan fully respected minority voting strength, and it felt no pressure to "maximize" black voting power, *Moon* J.S. App. at 20 -- unlike Georgia or North Carolina -- the Commonwealth quite properly saw no need to justify its choices with regard to other considerations.

B. The Commonwealth's concern to avoid retrogression in amending the 1991 plan provides no evidence of racial predominance in the initial adoption of the plan

Similarly, the district court's reliance on statements made *after* enactment of the 1991 plan to show a predominant racial purpose misapprehends the evidence. Having received preclearance for the 1991 plan, Virginia was under a section 5 obligation not to make any retrogressive changes. Thus, it was entirely proper for the General Assembly to provide that technical adjustment should not reduce the black population within the Third District. *See Moon* J.S. App. at 12. That section 5 requires attention to race in making changes logically says nothing about whether the plan being changed was overly race-conscious. The internally inconsistent nature of the district court's analysis is illustrated by its treatment of the 1992 and 1993 amendments. Here is what the district

court said:

> Although a *primary* reason for adjusting the districting plan's boundaries before the 1992 and 1994 elections was to reduce the number of split precincts in the plan, the technical amendment *resulted* in an increase in the Black percentage of the total population to 64.08% and the Black percentage of the voting age population to 61.24% in District 3.

Moon J.S. App. at 13 (emphases added). Even to call the increased black percentage *de minimis* -- let alone a purposeful attempt to enhance black voting strength -- would exaggerate its magnitude: the amendments increased the black percentage of the voting-age population by 0.07 percent. Given this infinitesmal effect, it makes no sense to say that race played a predominant role in the 1992 and 1993 boundary changes. As as the district court itself recognized, the primary purpose of the amendments was to avoid precinct splits -- precisely the state interest it later identifies as one the plan seemed to subordinate. The change in black percentage within the district was a byproduct, a "result," of this entire legitimate purpose. *Cf. Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) ("discriminatory purpose" implies more than "awareness of consequences"; it implies that an action was taken "at least in part 'because of,' not merely 'in spite of,'" its adverse effects). If the 1992 and 1993 changes were explicable for non-racial reasons, then as a matter of pure logic they cannot provide probative evidence that the 1991 plan had a predominantly racial motivation.

C. Race was only one of a constellation of factors in the creation of the Third District

This Court has clearly recognized "the presumption of good faith that must be accorded legislative enactments" regarding the sensitive subject of redistricting, *Miller*, 115 S.Ct. at 2488. Of course, the Virginia General Assembly was aware of the racial composition of the districts it drew and it intended to create a majority-black district. But that intention is not enough to trigger strict scrutiny. Rather, strict scrutiny becomes appropriate only if the plaintiff proves that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

The logical starting point for this inquiry, then, is to ask what a state's traditional districting practices in fact *are*, since it is otherwise impossible to determine whether race outweighed them. States "may avoid strict scrutiny by retaining *their own* traditional districting principles," *Vera*, 116 S.Ct. at 1961 (emphasis added). The equal protection clause provides no warrant for courts to decide, as a matter of "gauzy sociological considerations," *City of Mobile v. Bolden*, 446 U.S. 55, 75 n.22 (1980) (plurality opinion), what districting principles a state *should* have.[7] Only once a court properly comprehends a state's actual practices is it

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[7] For example, if a state had a traditional, politically motivated practice of splitting urban areas among districts in order to maximize suburban influence, *cf. Davis v. Bandemer*, 478 U.S. 109 (1986) (Indiana repeatedly split Marion County among several districts in each of which its voters formed a minority), then a court could infer nothing about the predominance of race from the fact that a plan split cities.

in the position to ask whether achievement of nonracial goals was improperly sacrificed to create a majority-black district.

One of the most striking aspects of the district court's decision is its failure even to cite or mention, let alone address, Virginia's list of redistricting principles.

Unlike the other states whose plans have come before this Court, Virginia had articulated a well-developed set of redistricting principles. Resolution No. 1, which essentially codified state constitutional law and practice extending in part back to the 1930's,[8] not only listed a series of mandatory "criteria" and subordinate, less binding "considerations," but also defined what *Virginia* meant by such terms as "compactness" and "contiguity." *See supra* page 5. As a matter of positive state law, Virginia viewed avoiding the dilution of minority voting strength as of equal importance with three other mandatory criteria -- ensuring equal population, and achieving reasonable compactness and contiguity. And it thought that avoiding dilution was *more important* than five considerations, including keeping political subdivisions intact,

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[8] Although Virginia adhered to a loose equal population standard as long ago as *Brown v. Saunders*, 159 Va. 28 (1932), it had a long and sorry history of racial discrimination touching the right to vote that had only recently been repudiated. It would be cruelly perverse to conclude that the fact that racial fairness is a relative latecomer to the list makes it *less* a "traditional" districting principle.

Moreover, the relative elevation over time of equal population to primacy of place on any list of redistricting criteria necessarily subordinates other districting principles. Thus, it makes no sense to compare the number of split political subdivisions today to those in plans prior to 1983, and *Karcher v. Daggett*, 462 U.S. 725 (1983), let alone those that antedated *Wesberry v. Sanders*, 376 U.S. 1 (1964). In Virginia, congressional districts can no longer be built exclusively out of intact jurisdictions.

preserving communities of interest, and protecting incumbents. Nothing in this Court's jurisprudence undermines Virginia's full authority to adopt and rank the potential districting principles as it did.

There is not even a scintilla of evidence in the record from which a court could conclude that race predominated over either equal representation or contiguity. As to the former, the total percentage deviation of the 1991 plan was 40 persons, producing a total percentage deviation of 0.00%, *see Moon* J.S. App. at 79. Race clearly did not predominate over equal representation.

Nor, given Virginia's longstanding definition of contiguity, did race subordinate contiguity. As a matter of Virginia law, territory connected only by water is contiguous. *See, e.g., State Corporation Comm'n v. Camp*, 333 F.Supp. 847, 851 (E.D. Va. 1971) (holding that Norfolk is contiguous with Hampton and observing that the General Assembly's awareness of "the many rivers separating cities and counties in Virginia is a foregone conclusion. They are, indeed, natural geographic boundaries for cities and counties throughout Virginia"); *First Virginia Bank v. Commonwealth*, 212 Va. 654, 655 (1972) (holding that the cities of Norfolk and Portsmouth, which are separated by the Elizabeth River, are contiguous); 1984-1985 Op. Atty Gen. Va. 128 (Oct. 4, 1984) (determining that "land areas which are separated only by a body of water, with no territory of like kind between them, may be considered 'contiguous'" for purposes of election laws regarding voter registration). In the past, Virginia had drawn congressional districts contiguous only over water. *See* Tr. at 339-40. Since all of Virginia's eleven congressional districts satisfy the state's decades-old definition of contiguity, any finding that contiguity was subordinated to race would be clearly erroneous.

The *only* mandatory criteria that could even conceivably have been compromised by the creation of the Third Congressional District is compactness. And here, too, the district court's analysis was remarkable for its glaring disregard of Virginia's traditional definition of compactness. In *Jamerson*, the Supreme Court of Virginia made pellucidly clear that compactnessness is *not* synonymous with preservative of communities of interest or use of subdivision boundaries:

> [T]he use of the words "contiguous and compact," as joint modifiers of the word "territory" in Article II, § 6,[9] clearly limits their meaning as definitions of spatial restrictions in the composition of electoral districts. Indeed, when we were dealing with the reapportionment policies of minimizing the splitting of counties and cities and of recognizing existing communities of interest in *Brown v. Saunders*, [159 Va. 28 (1932),] we did not mention them as a part of this constitutional requirement, as the complainants contend. Instead, we simply referred to these policies as a "custom" and as a consideration in reapportionment of electoral districts.

244 Va. at 514 (internal citation omitted). But much of the district court's compactness analysis in this case focused on the question of how many jurisdictions were split -- precisely the question that the Supreme Court of Virginia had held was *irrelevant* to the compactness criterion. This Court has

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[9] Art. II, § 6 of the Virginia constitution provides, in pertinent part, that "[e]very electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district," and is the state constitutional foundation on which the "equal representation" criterion is based.

squarely stated that compactness is not an independent question of federal law, *see Shaw I*, 509 U.S. at 647, and thus the district court had no justification for ignoring Virginia's 60 year-old practice of considering compactness without regard to political subdivisions.

Considered in this way, the Third District is compact. First, it is more compact both than other districts drawn in the 1991 plan *and* than districts in previous apportionments. Second, the Third Congressional District is entirely comparable to the shapes of the Fifteenth and Eighteenth State Senatorial Districts, both of which the Supreme Court of Virginia found to be sufficiently compact as a matter of state law. *See Jamerson*, 244 Va. at 515, 518 (maps). It is clearly erroneous to say that the Third District represents a significant sacrifice of compactness.

But even if some compactness were sacrificed in the redistricting process, the district court was simply wrong to conclude that compactness was sacrificed for racial reasons. First, the relationship between minority representation and compactness was not a one-way street. Unlike the other plans that have come before this Court, Virginia sacrificed some degree of minority representation to compactness; after all, the General Assembly declined to draw a second majority-black district or a black "influence" district. It makes no sense to say that racial considerations *predominated* when they in fact gave way to a substantial degree. Second, there was a prominent alternative plan -- introduced by Senate Majority Leader Hunter Andrews -- that drew a majority-black district that had smoother boundaries. *See Moon* J.S. App. at 80. Thus, even if some compactness was somewhat subordinated to something, the district court erred in thinking it had been subordinated to *race*, when the testimony at trial shows that partisanship and incumbent protection underlay the General Assembly's decision. *See* Tr. at 349-51.

The district court's treatment of the state's policy "considerations" is equally flawed. A few examples will suffice. The decision to split Richmond between a Democratic and a Republican district, or to split Newport News to preserve Republican incumbent Herb Bateman's seat while nonetheless providing for a new, predominantly Democratic district from which Bobby Scott could run reflects "traditional districting principles," even if it does not comport with some platonic, judge-derived theory of how districting should be done. Moreover, it is utterly inconceivable that Virginia would have drawn a majority-black district if it had been forced to sacrifice Tidewater area incumbents or the Democrats' aspiration of picking up a new seat in Northern Virginia. Indeed, the General Assembly decisively rejected plans that would have produced that result.

Similarly, the district court's observation that the Third District lacks a "common interest," *Moon* J.S. App. at 18, because it encompasses multiple cities and stretches over "200 road miles of territory," is belied by the fact that even the plaintiffs' witness testified that people in the Hampton Roads area travel among jurisdictions daily, Tr. at 216; that seven of Virginia's other ten districts are larger in area, Defendants' Exhibit 1, at 5; and that the Virginia Supreme Court concluded in 1992 that two state senatorial districts that each joined parts of the Third Congressional District with areas 145 and 165 miles away and each split cities and counties nonetheless adequately considered preservation of communities of interest. *See Jamerson*, 244 Va. at 509, 515-16. The self-contradictory nature of the district court's view of communities of interest is captured in the final sentence of its discussion: "This conclusion is reinforced by the fact that approximately two-thirds of the population are black Americans and approximately one-third are white or other Americans." *Moon* J.S. App. at 18. What can this sentence possibly mean, other to suggest that the district court thinks

that only monoracial districts or majority-white districts can "harbor a common interest," *id.* -- both sentiments utterly repugnant to the Constitution?

Of course, Virginia traded off some compactness and some preservation of political subdivision lines and precinct boundaries in drawing its 1991 statewide plan. But it also sacrificed some maximization of black voting strength, some political fairness, and one incumbent. Every criterion and policy consideration except equipopulosity gave way somewhat. It is simply impossible to distill from this complex, deeply political process a conclusion that race was the predominant factor driving the redistricting engine. And it is far more plausible to conclude that when compactness and political subdivision lines were sacrificed, they yielded, as they had repeatedly done in the past, to the Commonwealth's nonracial political and economic interests. In short, the district court erred in assuming that "[r]ace was the criterion that, in the State's view, could not be compromised," *Shaw II*, 116 S.Ct. at 1901; race was simply one factor among many and it was in fact compromised.

II. The Third District satisfies even strict scrutiny because it is an appropriate response to Virginia's obligations under section 2 of the Voting Rights Act

The district court's holding that the Third District could not survive strict scrutiny was premised on its belief that the Commonwealth had no basis for fearing liability under section 2 of the Voting Rights Act.[10] This conclusion, in

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[10] The district court's offhanded observation that the Justice Department's entirely appropriate disavowal of any "maximization" policy meant it also would not bring a section 2 lawsuit if the state clearly diluted black voting strength, *Moon* J.S. App. at 20-21, illustrates the district court's misunderstanding of voting rights law.

turn, rested on the court's extraordinary and unsupportable conclusion that section 2 plaintiffs would be unable to satisfy the third prong of the test set out by this Court in *Thornburg v. Gingles*, which asks whether "the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances ... -- usually to defeat the minority's preferred candidate." 478 U.S. at 51. (The district court essentially assumed for the sake of argument that section 2 plaintiffs would be able to meet the remaining requirements for establishing liability. *See Moon* J.S. App. at 21-22.) In addition, the district court thought that the Third District was not narrowly tailored because it did not overlap with mathematical precision the precise areas where voting rights violations had occurred. As to the question of white bloc voting, the district court's factual findings were both clearly erroneous and tainted by a misunderstanding of the relevant legal standard. As to the question of the precise placement of the Third District, the district court simply misunderstood this Court's directives in *Shaw II* and *Vera*.

A. Virginia had a strong basis in evidence for believing there was legally significant white bloc voting within the area where it located the Third District

This Court's decisions make clear that a state may have a "strong basis in evidence" for taking race-conscious action without first being held liable under section 2. *See Shaw II*,

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Both the text of section 5 and the Department's standard policy expressly leave open the possibility that the Department will sue under section 2 to enjoin a practice it precleared under section 5, and the Department has done precisely that several times in the past. Moreover, this Court's recent decision in *Reno v. Bossier Parish*, 65 U.S.L.W. 4308 (May 12, 1997), suggests that would have been the correct course for the Department to take.

116 S.Ct. at 1905 (assuming, for the sake of argument that North Carolina had a strong basis in evidence, although there had been no judicial finding); *Vera*, 116 S.Ct. at 1970 (O'Connor, J., concurring) (explaining why Texas had a strong basis in evidence for race-conscious districting in the Dallas area). In her concurrence in *Vera*, Justice O'Connor pointed to these factors in explaining why Texas had a strong basis for concluding "that the creation of a majority-minority district was appropriate": prior judicial findings of racial vote dilution within the relevant region; testimony regarding racial bloc voting; and examples of reasonably compact, plurality-black districts. *Id.* Virginia satisfies this test.

The district court's conclusion to the contrary regarding the presence of bloc voting was the linchpin of its analysis. That conclusion rests on four glaring mistakes. First, the district court completely ignored undisputed evidence showing that the vast majority of white voters had refused, in election after election, to vote for *any* black candidates. Both plaintiffs' and defendants' experts agreed that on average less than fifteen percent of the white electorate within the area in which the Third District was located were willing to vote for black candidates.

Second, the district court mistakenly relied on black electoral success *within majority black districts* to find an absence of white bloc voting. For example, the court emphasized that 9 of the 91 members of the Virginia House of Delegates were black. *Moon* J.S. App. at 22 n.7. But every one of those delegates was elected from a majority-black constituency. In fact, each of them was elected from a constituency that was at least 57% black (and several other majority-black districts elected white delegates). Success within such majority-black districts quite simply provides no evidence for concluding blacks can win in majority-white districts. *See Gingles v. Edmisten*, 590 F. Supp. 345, 365-67

(E.D.N.C. 1984) (three-judge court) (explaining that black electoral success from majority-black election districts did not undermine the conclusion that black candidates would lose in majority-white jurisdictions), *aff'd*, 478 U.S. 30 (1986).

Third, the district court seemed to think that black electoral success in other parts of the state was somehow relevant to whether black voters within the Third District could elect the candidates of their choice. Judge Widener, for example, repeatedly pressed the defendant's expert on racial bloc voting to explain why she had not taken into account the electoral success of a black mayoral candidate in Roanoke -- a city on the other side of the Blue Ridge Mountains and at least a three-hour drive from any part of the Third District. *See* Tr. at 438. Black electoral success for local office hundreds of miles away is legally irrelevant to the question whether black voters in the Tidewater and Richmond areas can elect the congressional candidates of their choice. *Cf. Shaw II*, 116 S.Ct. at 1906 (pointing out that "[t]he vote dilution injuries suffered by ... persons [in one part of a state] are not remedied by creating a safe majority-black district somewhere else"). To the contrary, there is a strong basis in evidence -- consisting of judicial findings in Richmond, Norfolk, and Henrico County and consent judgments in Hopewell and Newport News -- for concluding the opposite: that bloc voting has prevented blacks from electing their preferred candidates in local elections.

Fourth, the district court exaggerated the significance of Douglas Wilder's statewide success and Bobby Scott's success at the state legislative level. These two men are in fact the *only* blacks in this century to have won major state or federal office from a majority-white constituency in Virginia. The court failed entirely to take into account the unusual circumstances that had allowed them to win, or the

undisputed fact that, in the area where the Third District is located, neither man in fact could have won election to office from a majority-white constituency. For example, roughly three-quarters of white voters within the Third District supported Wilder's opponents in his races for governor and lieutenant governor. *See* Def. Exh. 1. And even this low level of support paints an atypically rosy picture: Wilder received an unprecedented share of the white votes cast. Finally, the court gave no weight at all to the most probative piece of evidence in this regard -- the fact that Bobby Scott himself had been unable to win election to Congress from a majority-white district in the same general area as the Third District, receiving only 8% of the white votes, far fewer than white Democratic nominees received in the succeeding two elections.

B. The Third District satisfies this Court's requirement that a remedial district be located where the potential section 2 violation is found

In *Shaw II*, this Court explained that narrow tailoring requires that a remedial district be drawn "coincident" with the potential section 2 violation whose remediation serves as the compelling state interest. 116 S.Ct. at 1906.

The district court committed serious legal and factual error in applying this standard. It concluded that the Third District "does not directly address the harm asserted," because some localities in which blacks experienced vote dilution were not included within the district. *Moon* J.S. App. at 21. That conclusion directly contradicts this Court's clear statement in *Shaw II* that the remedial siting requirement "does not mean that a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing

districts to comply with the mandate of § 2." 116 S.Ct. at 1906 n.7. Moreover, the Court has also made clear that states must have "leeway" about where exactly to place a remedial district; they need not draw "the precise compact district that a court would impose in a successful § 2 challenge," but need only respect "*their own* traditional districting principles." *Vera*, 116 S.Ct. at 1960 (opinion of O'Connor, J.) (emphasis added). Thus, the fact that *some* black voters with potential section 2 claims are not included in the Third District does not undermine the state's narrow tailoring.[11]

If one were to place a map of the places where credible claims of vote dilution had been brought on top of a map of the Third District, the overlap would be quite substantial. Most of the land bridge tying these areas together consists of intact counties such as Surry, Charles City, and New Kent. The district court took exactly the wrong message from the fact that only portions of five jurisdictions that had faced meritorious section 2 lawsuits were included within the Third District. *Moon* J.S. App. at 21. The parts of Newport News, Henrico, Hopewell, Richmond, and Norfolk that were included in the Third District were the places where the victims of proven or recognized vote dilution lived. The decision to split those jurisdictions was an integral part of narrow tailoring, in precisely the same way that splitting those jurisdictions into single-member districts for local elections was narrow tailoring: such division was necessary to remedy dilution through submergence.

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[11] To the contrary, the commonwealth's refusal to stuff every conceivable section 2 plaintiff into the Third District actually supports the conclusion that the district is narrowly tailored, both because it avoids unnecessary "packing" of black voters and because it allowed the district to have more regular boundaries.

Put simply, Virginia had good reason to believe that black voters in the Richmond and Tidewater areas could win a section 2 challenge to the failure to draw a single majority-black congressional district and it therefore drew such a district while fulling respecting its "own traditional districting principles," *Vera*, 116 S.Ct. at 1961 (emphasis added).

CONCLUSION

For the reasons stated above, the Court should note probable jurisdiction of this appeal.

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APPENDIX

Notice of Appeal, Dated March 7, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DONALD MOON and ROBERT SMITH,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No.
	)	3:95CV942
M. BRUCE MEADOWS,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
CURTIS W. HARRIS; JAYNE W. BARNARD; JEAN PATTERSON BOONE; RAYMOND H. BOONE; WILLIE J. DELL; HENRY C. GARRARD, SR.; WALTER T. KENNEY, SR.; and GERALD T. ZERKIN,	)	
	)	
Defendant-Intervenors.	)	
	)	

NOTICE OF APPEAL

NOTICE is hereby given that defendant-intervenors Curtis W. Harris, Jayne W. Barnard, Jean Patterson Boone, Raymond H. Boone, Willie J. Dell, Henry C. Garrard, Sr., Walter T. Kenney, Sr., Melvin R. Simpson, and Gerald T. Zerkin, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. 1253 from the judgment and

order filed February 7, 1997, declaring the Third Congressional District in Virginia to be violative of the United States Constitution and enjoining state officials in Virginia from conducting any future elections in that Congressional District.

Respectfully submitted,

/s/

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